

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

AMERIPRIDE SERVICES INC., a
Delaware Corporation,

Plaintiff,

v.
VALLEY INDUSTRIAL SERVICES,
INC., a former California corporation, et
al.,

Defendants.

No. 2:00-cv-00113-MCE-EFB

PRETRIAL SCHEDULING ORDER

After reviewing the parties' Joint Status Report ("JSR"), the Court makes the following Pretrial Scheduling Order. In the JSR, the parties state that the case is currently stayed and request an order lifting the stay. The parties do not cite to a specific order staying the case and the case is not currently marked as stayed on the docket. If there is in fact an order staying this case, it is lifted.¹

I. SERVICE OF PROCESS

All named Defendants have been served and no further service is permitted without leave of court, good cause having been shown.

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¹ This order pertains only to this case and not to the stays in related cases. See 2:12-cv-1723 (ECF No. 27); 2:12-cv-2476 (ECF No. 25).

1 II. ADDITIONAL PARTIES/AMENDMENTS/PLEADINGS

2 No joinder of parties or amendments to pleadings is permitted without leave of
3 court, good cause having been shown.

4 III. JURISDICTION/VENUE

5 Jurisdiction is predicated upon 28 U.S.C. § 1331. Jurisdiction and venue are not
6 contested.

7 IV. DISCOVERY

8 Both parties seem to agree that there should be discovery on two issues. First,
9 on the second remanded issue from the Ninth Circuit opinion, the parties agree there
10 should be discovery regarding the amount of response costs and whether they were
11 necessary and incurred in substantial compliance with the National Contingency Plan.
12 Second, the parties agree they will also need discovery to determine whether the
13 response costs incurred subsequent to the judgment are recoverable under the
14 declaratory judgment issued by the Court against Texas Eastern Overseas Inc. ("TEO").

15 TEO would also like to conduct discovery on the amount of insurance payments
16 that AmeriPride has received on post-judgment costs. This issue is before this Court for
17 the first time as part of this Court's duty to enforce the previous order regarding future
18 costs. While the Court previously determined that future costs would be split 50-50, the
19 order did not state whether insurance payments should be deducted from those future
20 costs. The collateral source rule is not usually applied in CERCLA cases and being
21 reimbursed for expenses that were covered by insurance is viewed as a "double
22 recovery." See United Alloys, Inc. v. Baker, 797 F. Supp. 2d 974, 1003 (C.D. Cal. 2011)
23 ("The Court has found no case law in which the collateral source rule was extended to
24 CERCLA actions."). Since the Court is now opening discovery on future costs for the
25 first time and given CERCLA's strong stance on double recovery, TEO is entitled to

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1 discovery on the insurance reimbursements AmeriPride has received on these post-
2 judgment costs only.²

3 All discovery, with the exception of expert discovery, shall be completed by
4 **September 30, 2015.** In this context, “completed” means that all discovery shall have
5 been conducted so that all depositions have been taken and any disputes relative to
6 discovery shall have been resolved by appropriate order if necessary and, where
7 discovery has been ordered, the order has been obeyed. All motions to compel
8 discovery must be noticed on the magistrate judge’s calendar in accordance with the
9 local rules of this Court.

10 V. DISCLOSURE OF EXPERT WITNESSES

11 All counsel are to designate in writing, file with the Court, and serve upon all other
12 parties the name, address, and area of expertise of each expert that they propose to
13 tender at trial not later than **November 30, 2015.**³ The designation shall be
14 accompanied by a written report prepared and signed by the witness. The report shall
15 comply with Fed. R. Civ. P. 26(a)(2)(B).

16 Within thirty (30) days after the designation of expert witnesses, any party may
17 designate a supplemental list of expert witnesses who will express an opinion on a
18 subject covered by an expert designated by an adverse party. The right to designate a
19 supplemental expert for rebuttal purposes only shall apply to a party who has not
20 previously disclosed an expert witness on the date set for expert witness disclosure by
21 this Pretrial Scheduling Order.

22 Failure of a party to comply with the disclosure schedule as set forth above in all
23 likelihood will preclude that party from calling the expert witness at the time of trial. An

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25 ² The fact that TEO was precluded from obtaining discovery on AmeriPride’s insurance payments
26 for pre-judgment costs due to a missed deadline is not dispositive here. Nor is the Court persuaded by
27 AmeriPride’s argument that this issue was waived when TEO did not raise it on appeal. TEO is not asking
28 the Court to allow discovery on pre-judgment insurance payments. Rather, the focus of this request is on
post-judgment payments, something this Court is considering for the first time.

³ The discovery of experts will include whether any motions based on Daubert v. Merrell Dow
Pharmaceuticals, Inc., 509 U.S. 579 (1993) and/or Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999)
are anticipated.

1 expert witness not appearing on the designation will not be permitted to testify unless the
2 party offering the witness demonstrates: (a) that the necessity for the witness could not
3 have been reasonably anticipated at the time the list was proffered; (b) that the Court
4 and opposing counsel were promptly notified upon discovery of the witness; and (c) that
5 the witness was promptly made available for deposition.

6 For purposes of this Pretrial Scheduling Order, an “expert” is any person who may
7 be used at trial to present evidence under Rules 702, 703, and 705 of the Federal Rules
8 of Evidence, which include both “percipient experts” (persons who, because of their
9 expertise, have rendered expert opinions in the normal course of their work duties or
10 observations pertinent to the issues in the case) and “retained experts” (persons
11 specifically designated by a party to be a testifying expert for the purposes of litigation).

12 Each party shall identify whether a disclosed expert is percipient, retained, or
13 both. It will be assumed that a party designating a retained expert has acquired the
14 express permission of the witness to be so listed. Parties designating percipient experts
15 must state in the designation who is responsible for arranging the deposition of such
16 persons.

17 All experts designated are to be fully prepared at the time of designation to render
18 an informed opinion, and give their bases for their opinion, so that they will be able to
19 give full and complete testimony at any deposition taken by the opposing party. Experts
20 will not be permitted to testify at the trial as to any information gathered or evaluated, or
21 opinion formed, after deposition taken subsequent to designation.

22 Counsel are instructed to complete all discovery of expert witnesses in a timely
23 manner in order to comply with the Court’s deadline for filing dispositive motions.

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1 VI. MOTION HEARING SCHEDULE

2 The last day to hear dispositive motions shall be **February 25, 2016**. All papers
3 should be filed in conformity with the Local Rules. However, with respect to Motions for
4 Summary Judgment only, the parties shall comply with the following filing deadlines:

5 Motion for Summary	filed at least 8 weeks prior to hearing
6 Opposition and any	filed at least 5 weeks prior to hearing
7 cross-motion	
8 Reply and opposition to	filed at least 3 weeks prior to hearing
9 cross-motion	
10 Reply to cross-motion	filed at least 1 week prior to hearing
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12 Absent leave of the Court, all issues the parties wish to resolve on summary
13 judgment must be raised together in one (1) motion or cross-motion. Should the parties
14 wish to file additional motions for summary judgment, they must seek leave of the Court.

15 The parties are directed to the Court's website for available hearing dates.
16 (www.caed.uscourts.gov → choose Judges → choose Judge England → choose
17 Standard Information)

18 All purely legal issues are to be resolved by timely pretrial motions. Failure to
19 comply with Local Rules 230 and 260, as modified by this Order, may be deemed
20 consent to the motion and the Court may dispose of the motion summarily. Further,
21 failure to timely oppose a summary judgment motion⁴ may result in the granting of that
22 motion if the movant shifts the burden to the nonmovant to demonstrate that a genuine
23 issue of material fact remains for trial.

24 The Court places a page limit for points and authorities (exclusive of exhibits and
25 other supporting documentation) of twenty (20) pages on all initial moving papers, twenty
26 (20) pages on oppositions, and ten (10) pages for replies. All requests for page limit

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28 ⁴ The Court urges any party that contemplates bringing a motion for summary judgment or who
must oppose a motion for summary judgment to review Local Rule 260.

1 increases must be made in writing to the Court setting forth any and all reasons for any
2 increase in page limit at least fourteen (14) days prior to the filing of the motion.

3 For the Court's convenience, citations to the Supreme Court Lexis database
4 should include parallel citations to the Westlaw database.

5 The parties are reminded that a motion in limine is a pretrial procedural device
6 designed to address the admissibility of evidence. The Court will look with disfavor upon
7 dispositional motions presented at the Final Pretrial Conference or at trial in the guise of
8 motions in limine.

9 The parties are cautioned that failure to raise a dispositive legal issue that could
10 have been tendered to the court by proper pretrial motion prior to the dispositive motion
11 cut-off date may constitute waiver of such issue.

12 **VII. FINAL PRETRIAL CONFERENCE**

13 The Final Pretrial Conference is set for **June 16, 2016 at 2:00 p.m. in**
14 **Courtroom 7.** At least one of the attorneys who will conduct the trial for each of the
15 parties shall attend the Final Pretrial Conference. If by reason of illness or other
16 unavoidable circumstance a trial attorney is unable to attend, the attorney who attends in
17 place of the trial attorney shall have equal familiarity with the case and equal
18 authorization to make commitments on behalf of the client.

19 Counsel for all parties are to be fully prepared for trial at the time of the Final
20 Pretrial Conference, with no matters remaining to be accomplished except production of
21 witnesses for oral testimony.

22 The parties shall file, not later than **May 26, 2016**, a Joint Final Pretrial
23 Conference Statement. The provisions of Local Rules 281 shall apply with respect to
24 the matters to be included in the Joint Final Pretrial Conference Statement. In addition
25 to those subjects listed in Local Rule 281(b), the parties are to provide the Court with a
26 plain, concise statement that identifies every non-discovery motion tendered to the Court
27 and its resolution. Failure to comply with Local Rule 281, as modified by this Pretrial
28 Scheduling Order, may be grounds for sanctions.

1 At the time of filing the Joint Final Pretrial Conference Statement, counsel shall
2 also electronically mail to the Court in digital format compatible with Microsoft Word, the
3 Joint Final Pretrial Conference Statement in its entirety including the witness and exhibit
4 lists. **These documents shall be sent to: mceorders@caed.uscourts.gov.**

5 The parties should identify first the core undisputed facts relevant to all claims.
6 The parties should then, in a concise manner, identify those undisputed core facts that
7 are relevant to each claim. The disputed facts should be identified in the same manner.
8 Where the parties are unable to agree as to what disputed facts are properly before the
9 Court for trial, they should nevertheless list all disputed facts asserted by each party.
10 Each disputed fact or undisputed fact should be separately numbered or lettered.

11 Each party shall identify and concisely list each disputed evidentiary issue which
12 will be the subject of a motion in limine.

13 Each party shall identify the points of law which concisely describe the legal
14 issues of the trial which will be discussed in the parties' respective trial briefs. Points of
15 law should reflect issues derived from the core undisputed and disputed facts. Parties
16 shall not include argument or authorities with any point of law.

17 The parties are reminded that pursuant to Local Rule 281 they are required to list
18 in the Joint Final Pretrial Conference Statement all witnesses and exhibits they propose
19 to offer at trial. After the name of each witness, each party shall provide a brief
20 statement of the nature of the testimony to be proffered. The parties may file a joint list
21 or each party may file separate lists. These list(s) shall not be contained in the body of
22 the Joint Final Pretrial Conference Statement itself, but shall be attached as separate
23 documents to be used as addenda to the Final Pretrial Order.

24 Plaintiff exhibits shall be listed numerically. Defendant exhibits shall be listed
25 alphabetically. The parties shall use the standard exhibit stickers provided by the Court
26 Clerk's Office: pink for plaintiff and blue for defendant. In the event that the alphabet is
27 exhausted, the exhibits shall be marked "AA-ZZ" and "AAA-ZZZ" etc. After three letters,
28 note the number of letters in parenthesis (i.e., "AAAA(4)") to reduce confusion at trial. All

1 multi-page exhibits shall be stapled or otherwise fastened together and each page within
2 the exhibit shall be numbered. All photographs shall be marked individually. The list of
3 exhibits shall not include excerpts of depositions, which may be used to impeach
4 witnesses. In the event that Plaintiff and Defendant offer the same exhibit during trial,
5 that exhibit shall be referred to by the designation the exhibit is first identified. The Court
6 cautions the parties to pay attention to this detail so that all concerned will not be
7 confused by one exhibit being identified with both a number and a letter.

8 The Final Pretrial Order will contain a stringent standard for the offering at trial of
9 witnesses and exhibits not listed in the Final Pretrial Order, and the parties are cautioned
10 that the standard will be strictly applied. On the other hand, the listing of exhibits or
11 witnesses that a party does not intend to offer will be viewed as an abuse of the Court's
12 processes.

13 The parties also are reminded that pursuant to Rule 16 of the Federal Rules of
14 Civil Procedure it will be their duty at the Final Pretrial Conference to aid the Court in: (a)
15 the formulation and simplification of issues and the elimination of frivolous claims or
16 defenses; (b) the settling of facts that should properly be admitted; and (c) the avoidance
17 of unnecessary proof and cumulative evidence. Counsel must cooperatively prepare the
18 Joint Final Pretrial Conference Statement and participate in good faith at the Final
19 Pretrial Conference with these aims in mind. A failure to do so may result in the
20 imposition of sanctions which may include monetary sanctions, orders precluding proof,
21 elimination of claims or defenses, or such other sanctions as the Court deems
22 appropriate.

23 **VIII. TRIAL BRIEFS**

24 The parties shall file trial briefs not later than **June 2, 2016**. Counsel are directed
25 to Local Rule 285 regarding the content of trial briefs.

26 **IX. EVIDENTIARY AND/OR PROCEDURAL MOTIONS**

27 Any evidentiary or procedural motions are to be filed by **May 26, 2016**.
28 Oppositions must be filed by **June 2, 2016** and any reply must be filed by **June 9, 2016**.

1 The motions will be heard by the Court at the same time as the Final Pretrial
2 Conference.

3 X. TRIAL SETTING

4 The trial is set for **Friday, August 5, 2016 at 9:00 a.m.** Trial will be a one (1) day
5 bench trial.

6 XI. SETTLEMENT CONFERENCE

7 At the Final Pretrial Conference, the Court may set a settlement conference if the
8 parties so request. In the event no settlement conference is requested, the parties are
9 free to continue to mediate or attempt to settle the case with the understanding that the
10 trial date is a firm date.

11 In the event a settlement conference is set by the Court, counsel are instructed to
12 have a principal with full settlement authority present at the Settlement Conference or to
13 be fully authorized to settle the matter on any terms. At least seven (7) calendar days
14 before the settlement conference, counsel for each party shall submit to the chambers of
15 the settlement judge a confidential Settlement Conference Statement. Such statements
16 are neither to be filed with the Clerk nor served on opposing counsel. Each party,
17 however, shall serve notice on all other parties that the statement has been submitted. If
18 the settlement judge is not the trial judge, the Settlement Conference Statement shall not
19 be disclosed to the trial judge.

20 Notwithstanding the foregoing, the parties may request a settlement conference
21 prior to the Final Pretrial Conference if they feel it would lead to the possible resolution of
22 the case. In the event an early settlement conference date is requested, the parties shall
23 file said request jointly, in writing. The request must state whether the parties waive
24 disqualification, pursuant to Local Rule 270(b), before a settlement judge can be
25 assigned to the case. Absent the parties' affirmatively requesting that the assigned
26 Judge or Magistrate Judge participate in the settlement conference AND waiver,
27 pursuant to Local Rule 270(b), a settlement judge will be randomly assigned to the case.

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1 XII. VOLUNTARY DISPUTE RESOLUTION PROGRAM

2 The parties do not consent to referral of this matter to the VDRP.

3 XIII. MODIFICATION OF PRETRIAL SCHEDULING ORDER

4 The parties are reminded that pursuant to Rule 16(b) of the Federal Rules of Civil
5 Procedure, the Pretrial Scheduling Order shall not be modified except by leave of court
6 upon a showing of **good cause**. Agreement by the parties pursuant to stipulation alone
7 to modify the Pretrial Scheduling Order does not constitute good cause. Except in
8 extraordinary circumstances, unavailability of witnesses or counsel will not constitute
9 good cause.

10 XIV. OBJECTIONS TO PRETRIAL SCHEDULING ORDER

11 This Pretrial Scheduling Order will become final without further order of the Court
12 unless objections are filed within seven (7) court days of service of this Order.

13 IT IS SO ORDERED.

14 Dated: July 17, 2015

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18 MORRISON C. ENGLAND, JR. CHIEF JUDGE
19 UNITED STATES DISTRICT COURT
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